STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NATHALIE R. HARPER, Charging Party, v. ALAMEDA COUNTY MANAGEMENT EMPLOYEES ASSOCIATION, Respondent.	Case No. SF-CO-223-M PERB Decision No. 2198-M August 29, 2011

Appearance: Nathalie R. Harper, on her own behalf.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Nathalie R. Harper (Harper) of a Board agent's dismissal of her unfair practice charge. The charge alleges that the Alameda County Management Employees Association (ACMEA) breached its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)[1] by: (1) its failure to notify Harper that her employer, the Alameda County Medical Center (ACMC), would not agree to include Harper's position in the bargaining unit; and (2) its handling of Harper's disciplinary proceedings. The amended charge further alleges that ACMC made a unilateral change by creating and filling Harper's position without providing ACMEA an opportunity to meet and confer.

The Board agent dismissed the charge, finding that it was untimely filed and that it fails to state a prima facie breach of the duty of fair representation. The Board has reviewed

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

Harper's appeal, the warning and dismissal letters, and the entire record in light of the relevant law. Based on this review, we affirm the dismissal for the reasons set forth below.

BACKGROUND

In February 2003, Harper was employed by ACMC in the position of Human Resources (HR) Technician, a position within a confidential bargaining unit represented by ACMEA. ACMEA, which has an affiliation agreement with Operating Engineers Local Union No. 3, is the exclusive representative for specific classifications at ACMC. In October 2008, Harper was promoted to the position of HR Compliance Auditor, a classification outside of the bargaining unit.

Harper requested that her new position be included in the bargaining unit. Harper contacted Alan Elnick (Elnick), an ACMEA representative, about the inclusion issue on three occasions and put her request in a letter to Elnick dated January 11, 2008.[2] Elnick never responded. Harper spoke to her manager, ACMEA bargaining team members and ACMC labor relations about her request for inclusion. She was told that ACMEA was slow in processing inclusion requests.

In a petition dated April 3, 2009 to ACMC, ACMEA requested that the HR Compliance Auditor title be included in the bargaining unit. ACMC responded by letter dated June 1, 2009, that it would not agree to inclusion because the position was assigned to the human resources file room where there was access to confidential labor relations information. It was not until Harper's receipt of a letter dated September 25, 2009 from ACMC's Chief Human Resource Officer Jeanette Louden-Corbett (Louden-Corbett) that Harper learned of

[2] Although Harper's letter is dated January 11, 2008, Harper alleges that her promotion did not occur until October 2008. Any uncertainty regarding the date of the promotion or the date of the letter, however, need not be resolved. These dates are irrelevant to whether the charge states a prima facie case and to whether it was timely filed.

ACMEA's April 3, 2009, petition and ACMC's June 1, 2009, response. From that same letter, Harper learned that ACMC sent Elnick an e-mail on March 20, 2009, that ACMC would not agree to inclusion of the position in the bargaining unit.[3]

The September 25, 2009 letter from Louden-Corbett was in response to a letter from Harper regarding the termination of her employment, which resulted from disciplinary proceedings in April 2009. In a letter dated April 22, 2009, to Dick Dodson, ACMC's director of labor relations, Harper requested a third step appeal, which was denied. Harper was terminated on or around April 27, 2009. The September 25, 2009 letter explains that the applicable disciplinary procedure for unrepresented employees such as Harper was found in Human Resources Policy and Procedure 1.30,[4] not in the ACMEA memorandum of

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[3] According to Louden-Corbett's letter to Harper of September 25, 2009, the March 20, 2009 e-mail states:

> Hi Alan –
>
> While we have no objection to you or anyone else representing Nathalie's interest in this matter, we do not recognize ACMEA as being her authorized representative. Her position has not been represented and we have not agreed that it be included in ACMEA. Therefore, her due process entitlement is contained in HR Policy 1.20 (*sic*). She does not have a right to binding arbitration.
>
> Dick

[4] Human Resources Policy and Procedure 1.30 states:

> 2. **Unrepresented Management Employees.**
>
> ACMC's unrepresented management employees are those individuals who are not appointed employees but who supervise other employees and are not represented by a labor organization. In the event that ACMC takes any adverse employment action against such an employee, the employee shall have the right to appeal that action to a hearing to be conducted by a Hearing Officer appointed by the Board of Trustees or its designee. Following the hearing, the Hearing Officer shall make a recommendation to the Chief Executive Officer (or his/her designee) who then will make a decision to sustain, modify or rescind the disciplinary action, which shall be final.

understanding. Elnick asserts that he informed Harper in March 2009, that she was not a member of the bargaining unit but that he would represent her in his personal capacity at her disciplinary proceedings.

Harper filed the unfair practice charge on March 22, 2010, and the amended charge on April 26, 2010. The Board agent dismissed the charge by letter dated May 26, 2010.

DISCUSSION

Statute of Limitations

The Board agent found that the charge was not timely filed. The Board agent determined:

> Your original request to be included in ACMEA's unit was made in January 2008. At no point do you indicate that ACMEA informed you that you were a unit member or that membership dues were going to commence. While ACMEA's failure to inform you of ACMC's decision in March 2009 to never allow the position you held to be included in the bargaining unit, and Mr. Elnick's assistance at your [*Skelly*[5]] hearing may have confused you, the fact is for more than six months you knew that your position was not in the bargaining unit represented by ACMEA. The charge is therefore untimely.

The Board is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072.) The limitation period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

[5] *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*).

In cases alleging a breach of the duty of fair representation, the six-month statutory limitation period begins to run on the date when the charging party, in the exercise of reasonable diligence, knew or should have known that further assistance from the union was unlikely. (*Los Rios Federation of Teachers, CFT/AFT (Violett, et al.)* (1991) PERB Decision No. 889; *SEIU, United Healthcare Workers West (Rivera)* (2009) PERB Decision No. 2025-M.)

There is no date prior to Harper's receipt of the September 25, 2009 letter from Louden-Corbett at which it can be concluded that Harper knew or should have known that assistance from ACMEA on her request to be included as a member of the bargaining unit was unlikely. While Elnick told Harper that she was not a member of the unit in March 2009, Elnick never told Harper that ACMC would not agree to inclusion or that ACMEA would not pursue the matter further. In fact, ACMEA filed its petition for inclusion of Harper's classification on April 3, 2009. Harper made several inquiries and was told that historically the union was slow in processing inclusion requests. Harper was never apprised of the status of her inclusion request and was never given a timeframe. Therefore, Harper had no reason to believe her inclusion request was not being processed until she received Louden-Corbett's September 25, 2009 letter.

The charge was filed on March 22, 2010, which is within six months of the date of Louden-Corbett's September 25, 2009 letter. Harper's receipt of the letter was the first point at which Harper knew or should have known that further assistance from ACMEA was unlikely. Accordingly, the charge is timely.

Duty of Fair Representation

"[U]nions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith."

(*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213, 1219 (*Hussey*), citing *Vaca v. Sipes* (1967) 386 U.S. 171, 190.) To prevail on a duty of fair representation charge, the charging party must fall within the category of employee to whom the duty is owed. As stated by the court in *Hussey*, the duty of fair representation is owed to bargaining unit *members*. The duty of fair representation does not extend to employees outside the bargaining unit. In *Los Angeles Unified School District* (1986) PERB Decision No. 599 (*LAUSD*), the Board affirmed the dismissal of a duty of fair representation charge on the grounds that the charging party, a substitute teacher, was not a member of the bargaining unit, and therefore the exclusive representative had no obligation to represent her. The Board referred to this issue as a "fatal defect" in the charging party's case.

When Harper was promoted to the HR Compliance Auditor position, she was no longer in the ACMEA confidential bargaining unit. Harper was aware of her unrepresented status, as evidenced by her January 11, 2008 letter to Elnick requesting that her new position be included in the bargaining unit. Elnick also informed Harper in March 2009, that she was not a member of the bargaining unit. Accordingly, as Harper was an employee outside the bargaining unit, Harper does not have standing to bring a duty of fair representation charge against ACMEA.

The charge alleges that Harper was never notified that her position would not be eligible for inclusion and that Elnick's "de [f]acto" representation of Harper at her disciplinary proceedings meant that she was a "represented" member of the bargaining unit. Harper's belief as to her status is irrelevant. ACMEA did not owe Harper a duty of fair representation because she was not a member of the bargaining unit (*LAUSD*), a fact not subject to dispute. In the appeal, Harper ultimately concedes this point, acknowledging that Elnick's "de [f]acto representation didn't make me a represented employee."

The charge also alleges that ACMEA's failure to notify Harper that ACMC would not agree to inclusion resulted in ACMC's denial of her third step appeal request. Under the facts of this case, it is difficult to conceive of an outcome different from the one that occurred. Even if Harper had been informed of ACMC's decision not to include her position in the bargaining unit, ACMC was under no obligation to grant Harper's request for a third step appeal. As an unrepresented managerial employee, Harper's only rights were those provided to her under Human Resources Policy and Procedure 1.30.

Finally, the charge alleges that Elnick "collud[ed]" with ACMC during Harper's disciplinary proceedings when he told her after the *Skelly* hearing that she was going to be terminated, not demoted, and that she should accept the severance package. Even if Harper were entitled to bring a duty of fair representation charge, the duty would arise only in the context of contractual remedies under the union's exclusive control. A non-contractual disciplinary hearing does not give rise to a duty of fair representation claim. (See, *Professional Engineers in California Government (Lopez)* (1989) PERB Decision No. 760-S.) Therefore, Elnick's representation of Harper during the disciplinary proceedings would not give rise to an unfair practice charge even if Harper were a represented member of the bargaining unit.[6]

[6] The amended charge alleges that ACMC implemented an unlawful unilateral change when it created and filled Harper's position without giving ACMEA the opportunity to meet and confer. The amended charge asserts that this action resulted in work being transferred from a position in a bargaining unit to a position outside of the bargaining unit. PERB has held that individual employees do not have standing to allege unilateral change violations. (See *Bay Area Air Quality Management District* (2006) PERB Decision 1807-M.) Further, a unilateral change charge, even if brought by ACMEA against ACMC, would be untimely if based on Harper's promotion, which occurred in October 2008. (See *County of Sonoma* (2011) PERB Decision No. 2173-M [limitation period begins to run when the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy].)

ORDER

The unfair practice charge in Case No. SF-CO-223-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.